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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-922**

Gary V. Burow,
Appellant,

vs.

Colby Lake, LLC, et al.,
Respondents.

**Filed January 9, 2012
Affirmed
Crippen, Judge***

St. Louis County District Court
File No. 69VI-CV-08-632

Gerald J. Brown, Victoria, Minnesota (for appellant)

Robert C. Barnes, McCarthy & Barnes, PLC, Duluth, Minnesota (for respondents)

Considered and decided by Bjorkman, Presiding Judge; Schellhas, Judge; and
Crippen, Judge.

U N P U B L I S H E D O P I N I O N

CRIPPEN, Judge

Appellant challenges the district court's dismissal of his claim against respondents
for breach of fiduciary duty, arguing that the decision rests on a clearly erroneous finding

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

that an exhibit is not credible evidence. Because the finding is amply supported by the record, we affirm.

FACTS

Appellant Gary V. Burow and a number of respondents formed Birch Cove, LLC to build and operate a motel in northern Minnesota. The parties do not dispute that approximately six years after its formation, Birch Cove defaulted on its mortgages and voluntarily entered into foreclosure, ultimately vesting the motel's title in lender Stearns Bank.

Approximately ten months after it acquired title, Stearns Bank sold the motel to respondent Colby Lake, LLC, a limited liability company owned by one of Birch Cove's six members and two adult daughters of a second Birch Cove member. Appellant claims that before Birch Cove entered into voluntary foreclosure, respondents formulated a secret plan with Stearns Bank and arranged for the post-foreclosure repurchase of the motel by select members and affiliates of Birch Cove. Appellant argues that by depriving him of notice of this plan, respondents excluded him from a business opportunity presented to them as fiduciaries. This argument is wholly woven into facts that appellant deduces from the contents of one item of evidence, Exhibit 9, a letter that the district court found to have "little evidentiary weight" and provide "little or no credence to appellant's theory."

DECISION

The district court's findings of fact will not be set aside unless clearly erroneous, and due regard is given to the district court's opportunity to judge the credibility of

witnesses. Minn. R. Civ. P. 52.01. “Findings of fact are clearly erroneous only if [we are] left with the definite and firm conviction that a mistake has been made.” *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quotation omitted). “The decision of a district court should not be reversed merely because [we view] the evidence differently.” *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999).

Appellant argues that the district court erred in finding that respondents did not have a pre-foreclosure arrangement to repurchase the motel at a favorable price. In support of his theory, appellant points to Exhibit 9, a letter, and argues that the content includes suggestions of its authenticity. Although this letter discusses voluntary foreclosure followed by refinancing for Birch Cove and is dated approximately four weeks prior to Birch Cove’s voluntary foreclosure, its credence is contradicted by a significant amount of other evidence. First, a representative of the bank denied the existence of a prior arrangement with respondents to repurchase the property and testified that he attempted to sell the motel to other prospective buyers with no success. Second, the letter does not suggest that a distinct entity will be formed to repurchase the motel and the sale price suggested in the letter is higher than the price paid by Colby Lake. Third, this letter was allegedly written by Birch Cove’s Chief Manager/President, but both he and the letter’s purported recipient deny having any knowledge of the letter. Additionally, the letter is not signed and the purported author’s typewritten name is misspelled and lacks the middle initial, which this individual regularly uses; the name of the bank is also misspelled. Finally, Birch Cove entered into voluntary foreclosure in July 2002 and Colby Lake was not formed until February 2003; and the purported

recipient of Exhibit 9 testified that he first became aware of Colby Lake in the spring of 2003.

The district court closely examined Exhibit 9 and found that, in light of the letter's "considerable inconsistencies with other evidence," it could be "afforded little evidentiary weight." Giving due regard to the district court's opportunity to judge the credibility of witnesses, the district court's factual findings on Exhibit 9 are not clearly erroneous. Because appellant has not proven the existence of a secret prior arrangement, his claim that respondents excluded him from a business opportunity presented to them as fiduciaries was properly dismissed.¹

Affirmed.

¹ The district court was also presented with evidence and argument on notice to appellant and failures on the part of appellant to inquire into the actions of Birch Cove, as well as considerable detail on the foreclosure process, but none of these issues require review, in light of the fact that appellant's entire breach-of-fiduciary-duty claim rests on his theory of respondents' secret prior arrangement, which appellant failed to prove.